Supreme Court, U.S.
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No. 98-1881

IN THE

Supreme Court of the United States

GEORGE C. S. LIU and GAIL K. LIU,

Petitioners,

v.

KENNETH P. SILVERMAN, ESQ., CHAPTER 7 Trustee of the Estate of George C. S. Liu and Gail K. Liu,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Was the Second Circuit Court of Appeals wrong in affirming the District Court for the Southern District of New York's determination that the Bankruptcy Court for the Southern District of New York did not err in affirming a $1.2 million settlement of the Debtors' malpractice and fraud actions against three attorneys and a real estate broker in New York State Supreme Court?

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FURTHER REASONS FOR GRANTING THE WRIT

THE COURTS HAVE BEEN MISLED AND, THEREFORE, ITS DECISIONS HAVE NOT BEEN IN THE DEBTOR'S BEST INTEREST.

On August 19, 1997, Chief Bankruptcy Judge Tina L. Brozman, Southern District of New York, approved a settlement in the amount of $1,200,000 for an action commenced by the debtors, before their bankruptcy filing, against three attorneys and a real estate broker (the brother of Louis J. Macari, Esq.). The action was, among other things, for fraud, malpractice, breach of fiduciary duty, forgery, conflict of interest, misrepresentation.

The malpractice carriers settled for the sum of $1,175,000 (payment to the trustee) and the real estate broker, Joseph Macari, agreed to pay $25,000. As a result of this settlement, the creditors would get paid, the trustee and his attorney would get paid, the attorney in the State Supreme Court action would get paid and the debtors would receive nothing.

The respondent's brief misleads this Court as the respondent has misled all of the lower courts. The respondent claims that the debtors sought damages in excess of $6 million in their state court action and, "[i]nexplicably, the Debtors now the claim to have suffered damages in excess of $31 million."

Since the date of the scam and fraud by the attorneys and broker against the debtors, the amount of damages have grown from June 1986 through September 1998. The debtors have had to borrow monies from a bank and received a

purchase money market mortgage from the Seller (the real estate broker) of the property they purchased pursuant to the direction of these attorneys. The debtors have had to mortgage their other properties to stay current on the mortgage obligations of the building they bought.

It was because of the massive fraud inflicted upon the debtors that their debts became so high. They lost five properties they had owned before they were defrauded and lost the property on which they were, under the advice of Elliot M. Rudick, Esq., forced to file bankruptcy. Further, without their agreement, the debtors' Chapter 11 bankruptcy was converted to a Chapter 7 filing. They also lost their home on June 19, 1997 and became homeless. The debtors have requested that this massive fraud be investigated by the Grievance Committee of the District Court.

With the high interest rates they were forced to pay, and the loss of six properties, the debtors lost more than $31,000,000. The net value of the lost properties exceeds twelve million dollars. The Trustee is trying to make the debtors look like liars. They are not. The real cost of their loss is $31 million and growing.

In referring to how the Petitioners arrived at the $31 million damages figure, the Respondent should not deliberately intimidate the Petitioners' rightful statement and hinder this Court's procession. The Respondent should review the Petitioners' (Appellants) Sur-Reply, which was filed in the United States Court of Appeals for the Second Circuit on September 28, 1998, with its attached exhibits, for full details and explanations.

It is hard to comprehend how a trustee with his attorneys could obstruct justice in such grievous magnitude? Yet, they did.

The debtors' attorney in the State action, Elliott A. Rudick, Esq., now the Trustee's special council, had always told the debtors that they had a very strong case. The Trustee, relying on Mr. Rudick's statements, kept Mr. Rudick as its attorney on the state court action. Little did anyone know that Mr. Rudick is not an experienced trial lawyer and that he was not prepared to try the case even though he had submitted a Note of Issue in the state court action stating that he was ready to try the case. The Trustee had lost confidence in Mr. Rudick and was anxious to settle the case for fear that he would not be compensated if Mr. Rudick were to bring the case to trial. Mr. Rudick knew he was not capable of trying their case and wanted an easy, sure way out and to receive a guaranteed pay day.

However, on the date Judge Brozman approved the settlement, the Trustee's attorney in the Bankruptcy proceedings and Mr. Rudick both told Judge Brozman that the debtors had a weak case and that the case should not be brought to trial.

If the case had gone to trial and the debtors lost, no one would have received any money. But the case would not have been lost since the documents that would have been presented at trial would conclusively have proven the guilt of the defendants. If the case was won, everyone would have won, including the debtors. The Trustee and Mr. Rudick did not want to take a chance at trial. If settled, Mr. Rudick would receive $400,000 plus a previously paid $50,000 retainer, the Trustee, his attorney and creditors get paid. Meanwhile,

the mastermind of the scam, Joseph T. Macari, would not be exposed and his net assets of $150 million would remain intact. The debtors get nothing. The debtors were sold out for a sure thing — monies to everyone but the debtors.

That is why the respondent's answer paints the debtors as unreliable and opportunists. That is why respondent misled the Court with money figures that have negative implications on the debtors' veracity.

The truth has been distorted by the Trustee in order that the debtors' writ be denied.

The lower courts listened to the misleading statements of Mr. Rudick and the Trustee's lawyer in order to reach its decisions. Mr Rudick and the Trustee had reason to mislead the courts — if the court did their bidding, they would be guaranteed large sums of money and also protect the mastermind of the scam, real estate broker Joseph T. Macari (the brother of Louis J. Macari, Esq.). If the courts did not agree with their position, they would have to take a chance.

The lower court abused its discretion in that they were blinded by misrepresentations and made a determination which adversely affected the debtors and creditors, not the attorneys and the Trustee for the Estate.

That there was a counterclaim by the real estate broker should not have entered the picture. If the debtors were to win the state court action, then the counterclaim would be unsuccessful and no legal obligation would be incurred by the debtors. As Chief Judge Tina L. Brozman stated during the hearing on August 19, 1997:

> I don't really see how that could be a sustained claim against the Liu's. They didn't have any obligation running to Mr. Macari, so I don't see how he could recover based upon the loss that occasioned as to themselves because he made the decision to foreclose. What's the authority for the recovery of legal fees, since the American rule is each party bears its own?

During the hearing, David Graubard, Esq. stated:

> I want to make two observations. One is with respect to the claims of Joseph T. Macari and Blair House Owners, it seems to me, going over the elements of those claims, that if there is a successful judgment against Mr. Macari in the State Court, those claims go out the window as a matter of course, because they're all wrapped in the same set of facts.

The Court: "Right."

Mr. Graubard:

> The second thing is we had attached recent articles concerning the Statute of Limitations as exhibits to our opposition to the settlement, and I don't think there's any question whatsoever that Statute of Limitations would only be prospective.

Lawrence H. Fine, Esq. Attorney for the Debtor stated during the hearing:

> . . . As Mr. Elliot M. Rudick had said, the Lius have suffered greatly not through their own making. I get emotionally with some clients also

> when I see great injustice. In essence, the attorneys are walking away scot-free what they've done. Nothing is coming out of their pockets. The Lius are going to wind up with nothing. I believe some of this case should go forward. There's no delays. I understand it was just three days before trial when settlement was reached. There is no additional expenses like the trustee had mentioned in his papers. All discovery has been complete. The case will not drag on. . . .

The debtors do not seek a different factual conclusion. After waiting five years and six months for a jury trial, the Lius merely seek their constitutional right to due process. The right to be heard.

On the date of the Settlement conference, neither the debtor nor the debtors' attorneys were permitted to attend the in camera conference held by Judge Brozman. Nobody representing the debtors was allowed to attend the conference even though the debtors and their attorneys were present in the courtroom. The Trustee had stated that other persons were present at the in camera chambers meeting, implying that the debtors were present. But they were not. The trustee is again misleading the Court.

Judge Brozman only heard the people who would benefit from the settlement. The debtors, who had the most to lose were deliberately excluded. Decisions were made without hearing from the debtors or the debtors' attorneys. Again, the debtors' due process rights were denied.

CONCLUSION

Based upon all of the foregoing, the debtors' petition for a writ of certiorari should be granted in its entirety.

Respectfully submitted,

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